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NO. 91-1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner adopts and incorporates by reference the questions presented for review at pages 1 through 4 of Petitioner's original Petition For Writ of Certiorari filed with the Court on June 4, 1992. The issues for review remained unchanged whether the trial court could exercise jurisdiction consistent with the Tenth and Fourteenth Amendments to the Constitution.

## LIST OF THE PARTIES

South Carolina Property and Casualty Insurance Guaranty Association, Petitioner and Garnishee below.

Sherman J. Olivier, Respondent and Plaintiff below.

Louisiana Insurance Guaranty Association, Garnishee below.

Alabama Insurance Guaranty Association, Garnishee below.

There are no parent companies or subsidiaries of the foregoing parties. Alabama Insurance Guaranty Association is not involved in the appeal. All parties to the appeal have previously filed Certificates of Interested Parties and Corporate Disclosure Statements in the Eleventh Circuit which remain correct.

There are two other parties in interest, no longer active in the case, the insolvent

employer Merritt Dredging Company, Inc. and Merritt's insolvent insurer, Midland Insurance Company. Petitioner believes Merritt and Midland have no interest in the outcome of the petition.

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## CITATIONS TO OPINIONS BELOW

The initial majority and dissenting opinions prompting the filing of Petitioner's original Petition For Writ of Certiorari, filed with the Court on June 4, 1992, were reported at Olivier v. Merritt Dredging Company, Inc., 954 F.2d 1553 (11th Cir. 1992), and were set out in Appendix A of Petitioner's original Petition For Writ of Certiorari. The initial decision was vacated, and a modified decision was rendered on December 21, 1992. The later decision is reported at Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827 (11th Cir. 1992). The later decision is set out in the Supplemental Appendix filed herewith. The opinion of the district court has not been reported and is set out in Appendix B of Petitioner's original Petition For Writ of Certiorari.

## STATEMENT OF THE GROUNDS FOR JURISDICTION

After the initial Eleventh Circuit decision of March 6, 1992, a timely Petition for Writ of Certiorari was filed on June 4, 1992. Petitioner also had pending a Suggestion of Rehearing En Banc, filed March 26, 1992.

It was necessary to proceed with the Petition for Certiorari since the Suggestion for Rehearing did not toll the deadline for filing in this Court. The Suggestion of Rehearing was denied in the modified decision, and Petitioner now seeks review of the modified decision.

At this stage, a Supplemental Brief is being submitted on behalf of Petitioner to clarify the procedural posture of the case and the reason why the original Petition is now ripe for consideration, primarily that the result in the Eleventh Circuit is unchanged.

It is submitted that the analysis of the initial decision from the Eleventh Circuit is

substantially unchanged by the modified decision, and the modified decision should be reviewed since it is contrary to the most recent decisions of the Supreme Court regarding the Fourteenth Amendment. Further, since the result is unchanged in the initial and substituted decisions below, the arguments and authorities cited in the initial Petition for Certiorari should apply now with equal force.

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1) and Supreme Court Rule 10. It is submitted that jurisdiction is proper since the decision of the Eleventh Circuit has decided important questions where the need for uniformity is great and where there is a split of authority.

The Supreme Court should take jurisdiction since the decision from the Eleventh Circuit was inconsistent with the result reached in a previous decision from the Second Circuit,

Rhulen Agency, Inc. v. Alabama Ins. Guar. Assoc., 715 F. Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2d Cir. 1990) (jurisdiction denied), and a previous Florida decision, South Carolina Ins. Guar. Assoc. v. Underwood, 527 So. 2d 931 (Fla. Dist. Ct. App. 1988) (jurisdiction denied). But see Georgia Insurers Insolvency Pool v. Brewer, 583 So. 2d 377 (Fla. Dist. Ct. App. 1991) (jurisdiction upheld), and Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d 310 (S.C. 1992) (jurisdiction upheld). The differences in the determination of similar issues by different courts throughout the country demonstrate the complexity of the issues, the lack of current law providing guidance to address such issues, and the importance of the issues presented for review by this Court.

## EXISTENCE OF JURISDICTION BELOW

Jurisdiction for garnishment in the district court was based on Ala. Code § 6-6-390 (1975), following a jury trial of a Jones Act claim. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291. An amicus brief filed in the Eleventh Circuit with respect to Petitioner's Suggestion for Rehearing En Banc has challenged subject matter jurisdiction.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. IV, Sec. 1; Amend. X and Amendment XIV, Sec. 1, all as set forth in the Appendix to Petitioner's original Petition For Writ of Certiorari filed with the Court on June 4, 1992.

## STATUTORY PROVISIONS INVOLVED

Alabama Long-Arm Statute, Rule 4.2(a), Ala.R.Civ.P.; Alabama garnishment statute, Ala. Code § 6-6-390 (1975); and various statutes creating South Carolina Property and Casualty Insurance Guaranty Association, S.C. Code Ann. §§ 38-31-20(3), 38-31-30, 38-31-40, 38-31-60(a), 38-31-60(b), 38-31-60(c), and 38-31-100(2) (1988), all as set forth in the Appendix to Petitioner's original Petition For Writ of Certiorari filed with the Court on June 4, 1992.

## STATEMENT OF THE CASE

Petitioner adopts and incorporates by reference the Statement of the Case in the original Petition For Writ of Certiorari. The Petitioner adds the following to disclose developments occurring subsequent to the filing of Petitioner's original Petition.

On December 21, 1992, the Eleventh Circuit Court of Appeals vacated and withdrew its initial opinion reported at Olivier v. Merritt Dredging Co., Inc., 954 F.2d 1553 (11th Cir. 1992), for which Petitioner originally sought review by this Court. At the request of a member of the Eleventh Circuit Court of Appeals, and subsequent to Petitioner's filing of its Suggestion for Rehearing En Banc, the Court issued a new opinion reported at Olivier v. Merritt Dredging Co., Inc., 979 F.2d 827 (11th Cir. 1992). It is this later decision for which Petitioner now seeks a review by this Court.

The later decision again reversed the District Court in Alabama which had dismissed Plaintiff's Writ of Garnishment on the grounds that the court lacked personal jurisdiction over South Carolina Insurance Guaranty Association. The Eleventh Circuit's vacated opinion of March 6, 1992 had also reversed the decision of the district court.

Both Eleventh Circuit decisions are substantially similar in their putative analysis of the issues. The primary difference is that the later decision no longer contains a dissenting opinion by Senior Judge Frank M. Johnson. In light of the similarities of analysis between the two opinions, Petitioner believes that its legal arguments set forth in its original Petition For Writ of Certiorari with respect to the Eleventh Circuit's vacated

order of March 6, 1992, are equally applicable to the later decision. Both decisions fail to acknowledge that the Petitioner has no contacts with the State of Alabama sufficient to support a garnishment action. Both decisions find personal jurisdiction in violation of the Tenth and Fourteenth Amendments. Additionally, both decisions fail to properly address the split of authority concerning jurisdiction over a Guaranty Association outside the state of creation.

Petitioner therefore adopts the arguments set forth in its original Petition For Writ of Certiorari, and also respectfully requests that this Court closely review the arguments in the initial dissenting opinion by Senior Judge Frank M. Johnson, which Petitioner seeks to adopt in this Supplemental Brief.

## ARGUMENT AND CITATION OF AUTHORITIES

### SCIGA's Due Process Rights Have Been Violated by a Finding of Jurisdiction by the Eleventh Circuit Court of Appeals.

The insolvency of a property and casualty insurance company raises a host of serious problems for a large number of people involving significant amounts of money. The present Plaintiff's demand for compensation, is one of thousands of claims that are referred to a receiver in the insurers domicile upon a determination of insolvency, and then forwarded to the appropriate state guaranty association for disposition.

Various state legislatures have enacted guaranty acts in order to minimize the loss and dislocation that occurs because of an insurer's insolvency. The South Carolina Insurance Guaranty Association (hereinafter "SCIGA"), is a public entity, created under state law, whose purpose is to alleviate the effects of

insurance company insolvencies on policyholders, claimants and property in, or claimants against policies issued to residents of, its state of creation. S.C. Code Ann. §§ 38-19-20, 38-19-170. SCIGA is a non-profit, unincorporated entity, in which membership is compulsory for "member insurers" that are licensed and write insurance in covered lines of business within the State of South Carolina. In spite of the fact that a state guaranty association is a conduit for public funds, providing a public benefit, where an insurer has been declared insolvent, guaranty associations such as SCIGA are an important step removed from the process by which insurance coverage is written. Among other things, its participation in the claims process is not voluntary nor calculated, but is dictated by its guaranty acts and the random circumstances under which a given claim arises.

It is entirely fortuitous, from the guaranty association's point of view, where its member insurers are domiciled, where the insureds conduct business covered by insurance issued within the state, and where a claimant resides or is injured at the time that an incident occurs. The member insurers that write policies in a given state may be domiciled anywhere in the United States; indeed, subject to certain limitations on international insurers, they may be located anywhere in the world. Their policies are issued to insured individuals and companies that likewise may be doing business anywhere in the United States or abroad, and such policies are contractual obligations made after risks are evaluated and the benefits derived from undertaking such risks are weighed.

Although the Eleventh Circuit opinion suggests minimum contacts do exist between

SCIGA and the State of Alabama, the record with respect to SCIGA clearly reflects that SCIGA does not have any significant connection to states other than South Carolina, and demonstrates that SCIGA has not "purposefully directed" any activities towards the State of Alabama, nor has it availed itself of the privileges of conducting business there. The basic flaw in the Eleventh Circuit analysis was to treat the guaranty associations the same as a private insurance carrier which voluntarily enters contracts with insureds in various states. The Eleventh Circuit thus misapplied the fundamental tests which have been set forth by this Court to determine whether an entity may be subject to the jurisdiction of a state with which it has no significant contacts. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). SCIGA had no relationship

to any claim or any policy with respect to the Plaintiff until the declaration of insolvency by the insurer, Midland Insurance Company, set the receivership and guaranty processes in motion. Only thereafter, and subject to the provisions of its state guaranty acts, did SCIGA become involved.

The Eleventh Circuit opinion apparently concludes that SCIGA and other similarly situated guaranty associations should somehow have been aware that they might be subject to suit in a state within which a member insured has contractual coverage obligations. However, a state guaranty association does not receive or maintain records on specific policies or their provisions, nor does it solicit business out of the state of creation like a private contractual carrier.

As noted in Petitioner's original Petition For Writ of Certiorari, the rationale set forth in this Court's decision of McGee v.

International Life Ins. Co., 355 U.S. 220 (1957), which is so heavily relied upon by the Eleventh Circuit, is inapplicable to guaranty associations such as SCIGA. SCIGA had no presence in Alabama, no property or employees in Alabama, collected no assessments, and had no direct dealings or privity with the insured as did the reinsurer in McGee. Indeed, the Eleventh Circuit has side-stepped a proper analysis of SCIGA's due process rights with respect to personal jurisdiction, by simply holding that if a member insurer is subject to jurisdiction, then a state guaranty association steps into the shoes of such member insurer for all purposes, and is somehow charged with all contacts with which any such member insurer may have developed with a given forum. This dubious analysis is contrary to the Due Process Clause, and, we submit, contrary to the provisions of the creating statutes as well.

SCIGA has no contractual arrangement with its member insurers, and more importantly, no contractual arrangements with the insureds of such member insurers. Additionally, as noted, the legislative act creating SCIGA specifically focuses on protecting property, insureds and claimants of South Carolina. The Act presupposes that, as a result of such focus, requests for the monies at the disposal of the guaranty association would be made in the state of its creation, not through a fortuitous garnishment action instigated in any state in which a particular individual might be injured.

It must be remembered that the issues involved in this case are not concerned with the responsibility for the claim in question (indeed the ocean marine exclusion should avoid coverage altogether), but rather the proper place where such claim should be brought. The

concept of a "guaranty" association must not be confused with the commercial notions of an insurance company or a guarantor, who voluntarily and for a profit entered into specific contractual relations of known scope and location. A guaranty association is a statutory mechanism designed to fund to a limited extent the payment of claims against insolvent insurers. It assumes its duties by operation of law, and functions on a genuinely non-profit basis. Resting personal jurisdiction upon an analogy of voluntary "assumption of obligations" by an insurance company or commercial guaranty is simply inappropriate under the circumstances presented. This is particularly true where the guaranty association does not contain a wholesale adoption of the insurer's policy--but in fact have a number of exclusions and limits on the dollar amount of exposure.

The district court decision, and Judge Johnson's dissent in the Eleventh Circuit's vacated opinion of March 6, 1992, correctly concluded that the exercise of jurisdiction over SCIGA violates the Due Process Clause of the Fourteenth Amendment. Neither SCIGA nor any other guaranty association should be subjected to jurisdiction in another state through the unilateral activities of member insurers, or through the fortuitous circumstances by which a given claim arises. Burger King Corp. v. Rudzewicz, World-Wide Volkswagen Corp. v. Woodson, Id. The exercise of personal jurisdiction over a guaranty association of another state likewise is inconsistent with the requirement of fair play and substantial justice, under the balancing test set forth in Burger King.

## CONCLUSION

Subjecting a state guaranty association to suit in multiple foreign jurisdictions is fundamentally inconsistent with the role and purpose of guaranty associations in their state statutory schemes, in the claims process, and in the fiscal assumptions that underlie the guaranty association system. A guaranty association is a carefully designed and closely balanced "safety net" which like any other safety device can be misused or misapplied. The assertion of jurisdiction over a guaranty association outside its state of creation is just such a misuse and misapplication.

If the decision of the Eleventh Circuit stands, the results for the state guaranty association system could be devastating. State guaranty associations would be potentially subjected to conflicting decisions of other state courts called upon to interpret the provisions of another state's guaranty act.

Based on all of the arguments set forth herein and in the initial Petition For Writ of Certiorari, Petitioner respectfully submits that the Court should grant its Petition for review of the Eleventh Circuit Court of Appeals' opinion below.

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